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Supreme Court, U.S.
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No. 89-1791

IN THE

Supreme Court of the United States

October Term, 1989

JOHN LAMBORN,
Petitioner,

v.

STATE OF DELAWARE,
Respondent.

SUPPLEMENTAL APPENDIX

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SUPREME COURT, U.S.

IN THE
SUPERIOR COURT OF THE STATE
OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	CRIMINAL ACTION
	)	NUMBER
JOHN STEPHEN	)	IN-80-01-0815
LAMBORN,	)	IN-80-01-0816
	)	
Defendant	)	

ORDER

Submitted: August 11, 1988
Decided: August 31, 1988

On Defendant's Motion for Post-Conviction Relief Pursuant to Superior Court Criminal Rule 35—GRANTED

Timothy H. Barron, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware

Larry W. Fifer, Esq., of Schmittinger & Rodriquez, P.A., Rehoboth Beach, Delaware, for defendant

This 31st day of August, 1988:

Upon consideration of the record before the Court and the contentions of the parties contained in the submitted briefs, it appears to the Court that:

1. John Stephen Lamborn, defendant, was charged with first degree rape, first degree burglary and felony theft. His defense at trial was alibi, although neither he nor any other defense witness was called to testify.

At the close of all the evidence, the Court instructed the jury on felony theft. In the course of the Court's instruction, the following charge was given:

> There is a statute in this state[1] that may have some bearing in this case if you make the requisite findings. I'll read to you some brief portions of the statute. A person found in possession of goods acquired as a result of the commission of a recent crime is presumed to have committed the crime. The Court may tell the jury of the existence of presumption, and if it does so, the defendant is entitled to a jury instruction that the presumption does not relieve the State of its burden of proving guilt beyond a reasonable doubt. Nevertheless, the jury may convict the defendant despite the existence of evidence tending to rebut the presumption if they find no reasonable doubt about the defendant's guilt.

Defendant's counsel made no objection to this instruction.

On March 10, 1980, the jury returned a guilty verdict and judgment was entered by the Court. The defendant's conviction was affirmed on appeal. *Lamborn v. State*

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[1] 11 *Del. C.* §306(c)(2)

Del.Supr., 450 A.2d 893 (1981) (Table).[2] Defendant now moves for relief pursuant to Super. Ct. Crim. R. 35(a)[3], contending, inter alia, that the Court's instruction concerning the possession of recently stolen items was constitutionally defective in light of the United States Supreme Court's holding in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and the subsequent holdings of the Delaware Supreme Court construing *Sandstrom* in *Hall v. State*, Del.Supr., 473 A.2d 352 (1984); *Craig v. State*, Del.Supr., 457 A.2d 755 (1983) and *Plass v. State*, Del.Supr., 457 A.2d 362 (1983). *In its supplemental answering brief, the State concedes,* based on the above authority, that the given instruction was constitutionally defective. I am satisfied that the question becomes: *Is the instruction fatal to the verdict, requiring that defendant's conviction be set aside? I am satisfied that the answer is in the affirmative.*

---

[2]The Delaware Supreme Court affirmed defendant's convictions in a consolidated appeal stemming from two separate trials and convictions. The first trial, with which this motion is concerned, was concluded on March 10, 1980, and resulted in a jury convicting defendant of rape first degree, burglary first degree and felony theft. The second trial concluded on April 30, 1980, with a jury convicting defendant of four counts of robbery first degree, three counts of possession of a deadly weapon by a person prohibited, two counts of possession of a deadly weapon during the commission of a felony and one count of unauthorized use of a motor vehicle. Defendant made only two arguments on appeal regarding his March 10 trial: that the Superior Court erred in denying his motion to suppress evidence, and that the police acted unlawfully in stopping and frisking him when he arrived at his house where a search warrant was being executed. The Supreme Court concluded that both arguments were without merit.

[3]Effective January 1, 1988, Rule 35 as supplanted by Superior Court Criminal Rule 61. This motion, however, was filed prior to the effective date of new Rule 61 and is, therefore, governed by the provisions of (old) Rule 35.

2. Generally, in a case where there is no contemporaneous objection to the event for which the defendant seeks postconviction relief, the defendant is barred from relief, Del. Super. Ct. Crim. R. 30(a). *See Flamer v. State*, Del.Supr., 227 A.2d 123 (1967); *Lane v. State*, Del.Supr., 222 A.2d 263 (1966); *Turner v. State*, Del.Supr., 137 A.2d 395 (1959), unless he can show cause for his failure to object at trial and actual prejudice resulting from the alleged constitutional violation. *Conyers v. State*, Del.-Supr., 422 A.2d 345 (1980); *State v. Carr*, Del.Super., IN-82-04-1688 through IN-82-04-1699, Taylor, J. (February 29, 1988) Order)[4].

3. In the matter *sub judice*, I am satisfied that since the legal predicate in support of the defendant's position that a jury instruction which fails to explain that a presumption is nothing more than a permissible inference is constitutionally defective did not arise until the holdings in *Plass, supra, Craig, supra,* and particularly *Hall, supra,* were announced some two to three years after defendant's trial, the defendant has demonstrated the requisite cause for his counsel's failure to object at trial.

4. I am equally satisfied that defendant has suffered actual prejudice as a result of the defective instruction. In *Hall v. State*, Del.Supr., 473 A.2d 362 (1984), on a factual record *nearly* identical to the one *sub judice*, the Delaware Supreme Court held that the term "presumption", where it is used in a criminal instruction, must be explained as an inference during the course of the jury charge. The Court in *Hall*, in evaluating the legal effect of using the term "presumption" in a §306(c)(2) charge, explained:

> In this charge the words "presumed" or "presumption" were used . . . and the word "inference" was never used, although "presumptions" of

this sort must be explained as inferences under recent case law. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The charge clearly indicates that if the possession is "explained to the satisfaction of the jury" the presumption "may be effectively rebutted." Most of the charge is a carefully worded charge on a rebuttable presumption and for many years a charge of this sort was deemed to meet constitutional standards. However, the charge does leave open the danger that it might be understood to shift the burden of proof to defendant because it fails to say that defendant has no duty to testify or to present evidence, and it does not specifically state that possession of recently stolen goods may be explained by evidence other than defendant's own testimony. The charge eventually goes on to explain that the presumption does not relieve the State of its burden of proving every element of the crime beyond a reasonable doubt, but such statement may itself have been difficult to apply correctly in view of the apparent significance of the presumption.

As was pointed out in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the effect of a presumption as explained in a jury instruction must be tested by the way a reasonable juror could have interpreted the charge and not by the interpretation which a court would place on the charge. Viewed in this light, the charge given in this case could well have been regarded by the jury as an instruction that one found in possession of recently stolen goods is presumed to be the thief unless he personally rebuts the presumption by an explanation which the jury finds to be satisfactory. Such an understanding would have been an incomplete understanding of the law as it now stands.

> At least since the decision in *Sandstrom v. Montana, supra,* it has been clear that a jury instruction such as this one on a rebuttable presumption does not meet constitutional requirements unless it is clearly explained that the presumption is actually no more than a permissible inference. The statute on which the "presumption" rests must also be read to refer to a presumption which has the characteristics of an inference if it is to be upheld in the face of constitutional challenges. The Delaware Model Charge 4H prepared in 1973 attempted to meet this requirement.
>
> Under the circumstances, the mere likelihood that the charge was misunderstood causes the charge to fall short of the constitutional requirements set forth in *Sandstrom v. Montana, supra.*
>
> The State does not attempt to defend the charge as given but, instead, it takes the position that any error in the charge was harmless since the only defense was alibi. We are of the opinion, however, that once the alibi defense was rejected by the jury, the focus had to be upon defendant's unexplained possession of recently stolen goods and a completely corrected charge on that issue was essential. Therefore, the conviction must be set aside and the case remanded for a new trial.

Hall, 473 A.2d at 355.

5. Having stated the above, I conclude that the analysis in *Hall* is controlling in this case. I also conclude that the instruction given here created the substantial likelihood that the jury misunderstood the nature of the presumption. As in *Hall,* the actual prejudice can be said to flow from the jury's obvious rejection of the alibi defense,

which then shifted the focus to defendant's failure to explain his possession of the recently stolen property. The failure to give a completely correct instruction on that issue was, therefore, fatal.

6. The conviction is set aside and the matter should be set for trial forthwith.

IT IS SO ORDERED.

VINCENT J. POPPITI, Judge

IN THE
SUPERIOR COURT OF THE STATE
OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action Numbers
	)	IN80-01-0815 and
JOHN STEPHEN	)	IN80-01-0816
LAMBORN,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

Submitted: October 26, 1988
Decided: February 8, 1989

Upon reconsideration, Defendant's Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 35 is DENIED.

Timothy H. Barron, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Michael W. Modica, Esq., of Aerenson, Ferrara and Lyons, Wilmington, Delaware, for defendant.

This 8th day of February, 1989:

Upon Consideration of the record before the Court and the letter memoranda submitted by counsel, it appears to the Court that:

1. The matter is presently before the Court on the State of Delaware's Motion to reconsider my decision and order of August 31, 1988. *State* v. *Lamborn*, Del. Super., Crim. Nos. IN80-01-0815, 0816, Poppiti J. (Aug. 31, 1988).

2. I granted the defendant's Motion for Postconviction Relief on the basis that the Trial Court's instruction on the presumption arising from the possession of recently stolen goods was not constitutionally valid under the decision of the United States Supreme Court in *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). *See also Hall* v. *State*, Del Supr., 473 A.2d 352 (1984) (Instruction on rebuttable presumption arising from possession of recently stolen goods did not meet constitutional standards when the only evidence connecting defendant with the burglary and theft was defendant's appearance in a bank the day after the crimes with coins similar to those taken from the victim). The State now requests the Court to reconsider this decision pursuant to Superior Court Criminal Rule 57.[1]

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[1]Superior Court Criminal rule 57 states as follows:

> If no procedure is specifically prescribed by rule, the Court may proceed in accordance with the corresponding Superior Court Civil Rule or in any lawful manner not inconsistent with these Rules, with the Rules of the Supreme Court, or with any applicable statute.

Notwithstanding the defendant's argument that the State's Motion for Reconsideration is time barred, I am satisfied that I should not apply the time limitations of Superior Court Civil Rule 59(e) and therefore hold that it was timely filed.

3. The issue presented by this motion is whether the constitutionally defective jury instruction addressing the possession of recently stolen goods constitutes harmless error. In *Rose* v. *Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), a jury instruction that all homicides are presumed to be malicious was deemed to be subject to a harmless error analysis. *See also Delaware* v. *Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (harmless error analysis applied to violation of the Confrontation Clause); *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d (1967) (comment by prosecutor on defendant's failure to testify at trial was not harmless error). The standard to be applied is whether that constitutional error as measured against the entire record was harmless beyond a reasonable doubt. *Rose, 478* U.S. at *583*. Moreover, a presumption of a fair trial exists when a case is tried by an impartial judge and jury:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Id. at 579.

4. Applying the harmless error standard to the facts of the present case, I am satisfied based on a review of the record marshalled by the parties that there is sufficient evidence to conclude that the defendant's guilt was established beyond a reasonable doubt.

In this regard the record reflects that an agent of the Federal Bureau of Investigation, expert in the science of hair and fiber comparisons, testified that two pubic hairs found by police after the incident in the victim's shower drain catch matched a pubic hair sample from the defendant, Lamborn. (TR A-96). This expert further testified that it is "very uncommon" for hairs from different individuals to exhibit the same microscopic characteristics. (TR A-96). Additionally, evidence was produced from which the jury could conclude that the defendant lied under oath during his preliminary hearing concerning how he acquired certain items of personal property consisting of jewelry and coins which were taken from the victim during the incident. (TR B-98, 99).

Although the victim could not describe the race of her attacker, she did describe him as being over six feet tall, weighing between 160 and 180 pounds and wearing a ski mask and gloves. This physical description accurately fits the defendant and the record further reflects that a ski mask which was taken from the defendant's car less than one day after the incident was similiar to the one worn by the assailant. (TR A-54, 55, 58).

Finally, the State contended that the defendant fled following the commission of the crime. The jury was properly charged that evidence of flight may tend to show guilt in relation with the other facts proven in the case. (Jury Charge (TR 15-16).

5. Having stated the above, I am satisfied that, although there was clear *Sandstrom* error in the jury instruction concerning recently stolen goods, the constitutional error was harmless error in the context of the entire record consistent with the holding in *Rose*. The defendant's Motion for Postconviction Relief upon reconsideration is therefore HEREBY DENIED.

IT IS SO ORDERED.

VINCENT J. POPPITI, Judge